2012

# Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing

Lynn S. Branham


SAINT LOUIS UNIVERSITY SCHOOL OF LAW
Legal Studies Research Paper Series

No. 2011 – 29

# Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing

Lynn S. Branham

Federal Sentencing Reporter, Forthcoming

# Follow the Leader: The Advisability and Propriety of Considering Cost and Recidivism Data at Sentencing

Lynn S. Branham*

When I learned that the Missouri Sentencing Advisory Commission had decided to provide judges with information comparing the financial costs and recidivism risks of several different sentencing options in a particular case, I did not ask: "Why would they do this? How could they take such an ill-chosen path?" Instead, I asked: "Why did it take so long?"

I welcome, and indeed applaud, the refinement that the Sentencing Advisory Commission has imported into the sentencing structure in Missouri. To me, it is time to consider next how we can build upon this reform initiative and transplant it, with dispatch, across the country. But I have found that there are those, including individuals whom I deeply respect, who are resistant to this change – those who, by all appearances, want to keep us in the "same ole, same ole" sentencing box in which uninformed, and sometimes misinformed, sentencing decision making is the norm. So it is advisable, in my opinion, to take some time to respond briefly to the concerns they have proffered about the provision of comparative cost-risk information to judges and the factoring of that information into their sentencing decisions.

I have set forth below some of the primary reasons why I believe the institution of the practice of allowing judges access to some very basic facts about the financial cost of several sentencing options they are mulling over and their effects, in terms of recidivism reduction, is not only appropriate, but laudable.

1. *Judges already engage in cost-benefit assessments, though typically crude ones, when imposing sentences*. To suggest that the consideration by judges of the relative costs and risks of varying sentences is radical and unseemly is, first, to ignore the reality that judges already do this every day. Judges often grapple, for example, with such questions as what sentence would be most effectual and advisable for a burglar or chronic thief who committed a crime to secure money to support a drug habit. The judges are trying to determine, as best they can, whether society's interests, including its interest in being protected from future crimes, would be best served by a community sanction combined with drug treatment or, alternatively, by a period of incarceration. The judges are, in short, undertaking a cost-benefit analysis.

2. *Judges should engage in cost-benefit assessments as part of the sentencing decision-making process*. Not only do judges already weigh, though roughly, costs, risks, and benefits when rendering sentencing decisions, but they also should engage in this kind of reflective, rather than reflexive, decision making. Let me offer a medical analog. As a doctor is determining the optimal way to respond to a medical problem, who would protest if the doctor considered the full range of treatment options available, including the

* Visiting Professor of Law, Saint Louis University School of Law

risks, costs, and benefits of each option? And who would condemn the doctor for choosing the cheapest alternative, one that has a much higher success rate than the most expensive option, or, conversely, for choosing a more expensive alternative when it poses a significantly diminished risk of death? We, of course, want and expect the professionals to whom we have entrusted our lives and health to look at the pros and cons of the various medical-care options. Similarly, there is nothing remiss or askew in also wanting and expecting judges, those to whom we have entrusted decisions bearing on our and others' liberty, property, and safety, to carefully weigh the pros and cons of various sentencing options.

There are those, however, who decry the overt and official importation of comparative cost-risk information into sentencing decision making on the grounds that it will lead to disparity in sentencing. The apparent concern is that one judge, when sentencing, may factor the costs and risks in one way, another judge may accord differing weight to the same costs and risks, and a third judge may ignore those costs and risks altogether. However, concerns about unwarranted disparity due to the differential treatment of a sentencing factor extend to all sentencing factors, not just financial costs and recidivism risks. One judge, for example, may give more weight to a victim-impact statement than another judge does in a case with almost identical facts. In the end, concerns about disparity are not to be discounted, but their resolution must be addressed through the structuring of the overall sentencing system rather than by precluding judges from considering facts relevant to sentencing.

3. *It is advisable and efficient for the financial costs and recidivism risks of various sentencing options to be calculated by experts who then transmit this information to a sentencing judge*. It would be odd, after concluding that judges already do and should consider the comparative cost-effectiveness of differing criminal sanctions, to bar judges from receiving feedback to make that assessment process more accurate and efficient. Insisting that judges can only conduct uninformed cost-benefit analyses obviously would make no sense. So instead of requiring judges, who are not financial analysts or criminologists, to individually calculate the financial costs of a particular sentence or the recidivism risks it poses, Missouri, quite wisely in my opinion, remits these calculations to the experts – the sentencing commission. But while the sentencing commission is the number cruncher, the final decision as to what is a cost-effective and just sentence in an individual case is left, as it should be, to the sentencing judge.

4. *The consideration by judges of the costs and risks of the varied sanctions that they could impose on a defendant comports with, and indeed furthers, sentencing objectives, including retribution*. One of the principal arguments propounded in opposition to the practice of tendering cost-risk information to judges for their consideration when crafting the most appropriate penalty in a case is that it undermines sentencing objectives, particularly retribution. Opponents intone that judges are supposed to select a sentence based on what a defendant deserves, not on what a sanction costs. One could write an article, perhaps even a book, dissecting this argument and refuting the assumptions on which it is grounded. But the following four points particularly warrant highlighting now:

a. The notion that judges are only to focus on retribution – on "just deserts" – when sentencing a defendant conflicts with the dictates of the sentencing statutes to which judges are bound to adhere. For example, the federal sentencing statute requires judges to consider a number of sentencing purposes and factors when choosing a sentence, including what sentence is "sufficient, but not greater than necessary" to achieve "adequate deterrence" and to protect the public from future crimes committed by the defendant.[1]

b. The feedback mechanism in Missouri not only gives judges information about the immediate fiscal costs of a sanction but also empirically validated data about the benefits of that sanction, in terms of the likelihood that a defendant subject to this penalty will not recidivate and be imprisoned. This latter information can prove insightful as judges strive to comply with statutory directives, like the one recounted above, to consider the effect of a sentence on the defendant's future propensity to commit a crime.

c. The concern that feedback tools like those utilized in Missouri will mark the demise of retribution as a sentencing objective rests on several misperceptions. Perhaps most fundamentally, those fretting about this innovation overlook the truism that confinement is not the only way to exact punishment for criminal misdeeds. Community sanctions can also serve retributive aims; they can also be punishing, as legislatures themselves recognize.[2] If anyone doubts that proposition, I encourage that person to volunteer to be subjected, even for two months, to electronically monitored home confinement, GPS monitoring, intensive supervision probation, day reporting, or any of a range of other sanctions that limit the relatively unimpeded freedom that so many of us take for granted. So even if a sentencing system were single-mindedly focused on securing "an eye for an eye," there are different ways, figuratively, to gouge out an eye, none of which would be foreclosed by an informed cost-risk assessment.

d. Even if we were to assume that retribution is the end-all of sentencing (a proposition with which I, a subscriber to the precepts of restorative justice, emphatically disagree), a judge's comparison of the costs and recidivism risks of various sentences promotes, rather than detracts from, the retributive objective. This objective, properly construed, is subject to what is known as the "parsimony principle."[3] According to this principle, when judges are deciding whether to imprison someone for a crime, they must apply the "least

---

[1] 18 U.S.C. § 3553(a).

[2] See, for example, ALA. CODE § 12-25-32(2)(b) for a long list of what the state legislature has described as "intermediate punishments" to be served within communities.

[3] For a discussion of this principle and its longstanding roots, see NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 59-62 (1974).

> restrictive (punitive) sanction necessary to achieve" penal purposes.[4] Thus, if a judge were to determine that a defendant's crime was serious enough to warrant either probation, accompanied by certain stringent conditions, for a defined period of time, or imprisonment, the judge would typically be obliged, under the parsimony principle, to impose the community sanction.

5. *Judges' consideration, at the time of sentencing, of reliable data about the financial costs and recidivism risks of various sentencing alternatives does not usurp legislative prerogatives.* There has been much ado that the Missouri reform initiative somehow encroaches on the dominion of legislators. I confess that, for me, this argument is a head scratcher. Here's why:

First, as noted earlier, informing judges about the costs and recidivism risks of sentencing alternatives enables them to not only meet, but better meet, sentencing objectives laid out by the legislature. Instead of, for example, deferring to the perhaps unsubstantiated statements of a defense attorney, prosecutor, or probation official who prepared the presentence report that a particular penalty will or will not promote the rehabilitation or specific deterrence that will dissuade the defendant from committing additional crimes in the future, a judge can consider, as one of many sentencing considerations, whether the data indicate that these assertions are well grounded.

Second, it is the legislature itself that accords judges the sentencing discretion whose exercise can affect the type of penalty to be imposed, its duration or amount, and the conditions that will attend certain community sanctions. So when judges consider facts that will allow them to choose which of the sentencing options authorized by the legislature is, in a particular case, the most effective and fiscally responsible means of implementing the legislatively prescribed sentencing objectives, the judges can hardly be said to be flouting the will of the legislature or derogating its authority.

Third, the view that only legislatures should consider the sentencing implications of cost-benefit assessments like those being instituted in Missouri overlooks one ineluctable point: There are multiple individuals and entities involved in sentencing decision-making processes. As the Supreme Court observed in *Mistretta v. United States*, "the sentencing function long has been considered a peculiarly shared responsibility among the Branches of government and has never been thought of as the exclusive constitutional province of any one Branch."[5] The multiplicity of parties making sentencing-related decisions often incorporate their perceptions about the financial costs of sanctions and their impact on recidivism into those decisions. So even if we were able – somehow, someway – to foreclose judges from undertaking cost-benefit analyses when imposing sentences and even if we wanted – for some inexplicable reason -- to foreclose them from identifying the most cost-effective way in an individual case to fulfill sentencing objectives dictated by the legislature, the same cost-benefit assessments would continue to be replayed in other realms outside the legislature. Perhaps most

---

[4] *Id.* at 59.
[5] 488 U.S. 361, 390 (1989).

notably, such cost-benefit analyses would continue to pervade the shadow world that has such a profound effect on sentences – the world of plea bargaining.

Fourth, I have heard some grumbling that the ostensible encroachment on the legislative function that follows from judges' consideration of financial costs and recidivism risks may even abridge the constitutional separation of powers. *Mistretta*, in my opinion, belies that argument. In that case, the Supreme Court rebuffed the contention that the emplacement of the United States Sentencing Commission within the judicial branch of the federal government violated the separation of powers. The Court emphasized that Congress continued to be vested with the legislative authority to define the "broad limits" of sentences – the minimum and maximum sentences that could be imposed for a federal crime.[6] Similarly, under the new informational construct in Missouri, the state legislature continues to set the broad limits of sentences, and judges continue to exercise the traditional judicial function of identifying the most appropriate sentence within those limits.

6. *The open dissemination of information to judges about the financial costs and recidivism risks of differing sentencing options in a case will bring more transparency and accountability into the sentencing process.* "Transparency" and "accountability" may be buzzwords to some, but I believe, and strongly so, in their inherent value – in their importance to ethical and accurate decisions. So yes, I would opt for having a sentencing commission make empirically validated information available to judges and, in turn, the public about the financial costs and recidivism-reduction benefits of differing sentencing options in a case. This practice is far preferable to having judges continue to make sentencing-related decisions based on their own hunches and assumptions about such costs and risks. Such decision making based on gut feelings inevitably yields sentences that pose greater hazards to the public's safety than would other sentences, are a wasteful expenditure of the government's limited resources, and unnecessarily curb individual liberty.

---

I unabashedly favor endeavors, like the one in Missouri, to better inform judges' sentencing decisions and to bring more transparency into the sentencing process. Missouri, commendably, has provided a foundation upon which other jurisdictions can now build as they develop further refined structures for collecting, disseminating, and considering data about the financial costs and recidivism risks of the sentencing options available to a judge in a particular case. Jurisdictions, for example, may develop cost-risk matrixes that include even more sentencing alternatives than the "regular probation," enhanced-supervision probation, prison, and shock probation about which Missouri judges can receive information.[7] But however these structures are finetuned, Missouri

---

[6] *Id.* at 396.

[7] *See* MO. SENTENCING ADVISORY COMM'N, 2 SMART SENTENCING, ISSUE 5, at 2-3 (Aug. 17, 2010).

has paved the way.  Thankfully.